



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 95 OF 2017

HITESH BIKHULA KHETIA.....APPELLANT

VERSUS

FATUMA JAMA MOHAMED.....RESPONDENT

RULING

1. By a notice of motion dated 5th September 2019, supported by an affidavit sworn by M.NYOLEI the applicant (**FATUMA JAMA MOHAMED**) prays that this appeal be dismissed and/or struck for want of prosecution.
2. The application is based on the grounds that it is now about 2 years since this appeal was preferred and no action has been taken to prosecute it.
3. The applicant has written to the **appellant (HITESH BIKHULA KHETIA)** requesting him to furnish her with the record of appeal or move the court but all in vain. The appellant is faulted of undue and unreasonable delay and the continued pendency of this appeal has prejudiced the respondent unduly.
4. The respondent did not file a response to the said application but filed written submissions.
5. The applicants submit that the delay by the Appellant to prosecute the appeal has been prolonged, pointing out that the Appeal was filed on 7th August, 2017 yet two years later, the same has not prosecuted nor has any intention to do so been demonstrated.
6. That the Appellant has not explained the reason of the delay nor furnished any plausible explanation for the reasons of non-prosecution of the appeal. The court is urged to infer that the appellant has lost interest in prosecuting the appeal, and has breached the fundamental principles of law including **Section 1A and 1B of the Civil Procedure Act** relating to the overriding objectives as well as **Article 50 (2)(e) of the Constitution** which requires that matters be determined expeditiously.
7. The respondent on their part submitted that **Order 42 Rule 35(1) and (2) of the Civil Procedure Rules** do not apply in the in this instance as the appeal has not been admitted and no directions have been given by the court as envisaged.
8. That the Memorandum of appeal has never been served upon the respondent and as such time cannot start running for the respondent to allege that it is over one year since service of the Memorandum of appeal was done.
9. That **Order 42 Rule 35(2)** is not applicable in this case as there is no evidence that the applicant had at any time requested the Registrar to list the matter for dismissal and he ignored. In support of this argument, the respondent cites the case of *Rosarie (EPZ) Limited versus Stanlex Mbithi James (2015) eKLR* where the court stated *“since order 42 rule 35(1) the appeal cannot be dismissed before direction are taken, the applicant should have taken advantage of order 42 rule 35(2) and cause the register to list the appeal for dismissal. If there had been such a correspondence which the registrar ignored, I would have been inclined to the application. Since however there is no evidence that the applicant had requested the registrar to list the matter in terms of order 42 rule 35(2) and the latter failed, I find it difficult to accede to the application”*.
10. It is explained that this matter has been in court ever since the appeal was filed, and the reason why it seems not have progressed much is that in 2018 the matter was pending for ruling on the appellant’s application for stay of execution pending appeal.
11. This court is urged to find that the application is premature as the same has not been admitted and no directions have been taken. Also, that the respondents have not demonstrated what loss she has suffered with the pendency of the appeal having already received the entire decretal amount from the appellant. The application dated 5/9/2019 be dismissed with costs to the Appellant.

ISSUES FOR DETERMINATION

a) Whether the Appeal should be dismissed

12. Order 42 Rule 11 of the Civil Procedure Rules states that;

Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.

13. Order 42 Rule 12 of the Civil Procedure rules states;

After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

14. It is clear that the matter was never set before a judge for directions. There is also no proof of any letter directing the registrar to list the matter before the judge for dismissal.

15. I take cognisance that in **Morris Njagi & another v Mary Wanjiku Kiura [2017] eKLR** the court held;

A party can only apply for dismissal where directions have been given. This is under Order 42 rule 35 (1) Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 rule 35 (2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal.

16. Also in **Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) eKLR** the court held;

“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”

17. Order 42, Rule 35(2) states;

If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

18. Certainly the respondent was at liberty to have the registrar list the matter in terms of **Order 42 rule 35** and failed to do so. However, she elected to make an application seeking dismissal of the appeal for want of prosecution. Does this warrant condemning her for failing to choose the procedurally accepted option?

19. In **Morris Njagi & another v Mary Wanjiku Kiura** (supra) the court held;

I am of the view that since no directions have been issued in the appeal the applicant (respondent) cannot move the court to dismiss the appeal for want of prosecution.

20. While I sincerely respect the views held by the other courts in matters of a similar scenario, I am rather perplexed by the argument that a party can file an appeal, refrain from serving the memorandum of appeal, and as long as no directions have been taken, then no adverse action should be visited on the dormant party. That if the applicant does not move the Registrar to cause the file to be listed before the judge for dismissal, then any other request for dismissal is flawed? I think that kind of indulgence only adds to the sagging backlog that torments the judiciary, and makes a mockery of the overriding objectives envisaged by **Section 1B of the Civil Procedure Act as well as Article 159 (2) (b)** that justice shall not be delayed, as well as **Article 2 (d)** which provides that justice shall be administered without undue regard to procedural technicalities.

21. The question that troubles my mind is this- once the decision seeking stay pending appeal was delivered on 5th July 2018, what hurdles did the appellant meet so as to remain inactive until he was stirred from deep slumber by this application for dismissal of the appeal. None is mentioned that would persuade to believe that the appellant was not indolent

22. I hold the view that the appellant is simply clutching on procedural technicalities to wish away the inactivity and inordinate delay which even if this court was to take into account that the inactivity was from July 2018, still spans more than one year. I cannot find a better word to describe the appellant’s conduct other than disinterest and inordinate and inexcusable delay. I hold that the application is merited and the appeal shall and is hereby dismissed for want of prosecution. I award costs of this application to the applicant.

Delivered and dated this 8TH day of APRIL 2020 at Eldoret

H.A. OMONDI

JUDGE